

Case 2:21-cv-00546-NIQA

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RAJAN PATEL

v.
ECFMG,

Civil Action No. 2:21-cv-00546

Hon. Nitza I. Quiñones-Alejandro

PLAINTIFF'S REBUTTAL TO DEFENDANT'S MOTION TO DISMISS:

In the Defendant's (ECFMG) response introduction, the defendant states "Plaintiff cannot establish that he has yet suffered an injury as a result of ECFMG's actions." I would like to assert here that I, the Plaintiff, have clearly stated that ECFMG's failure to promise me the extension of the 7 year policy (extend the 7 years to a time- frame that allows me to take the USMLE exam safely without wearing a mask) has caused me the damage/injury (suffering) whereby I am unable to even take the last exam (the USMLE step 2 ck, that I am currently registered to take). This is because the testing center has reasonably concluded that it is willing to grant me an accommodation under ADA law, allowing me to safely test without wearing a face mask as long as 1. ECFMG provides a compelling reason to do so (eg. ECFMG states in writing that my extended deadline to take the exam is coming up soon and that I need to pass my last exam by then in order to be ECFMG certified), and 2. ECFMG also grants the reasonable accommodation of giving me an extension to the seven year policy in writing now. Otherwise the testing center will not allow me to take the test without wearing a face mask. I can not wear a face mask during the exam because I have been given strict instructions by my medical doctor at Johns Hopkins Hospital not to wear a mask for the length and period of time as the exam, as it causes me dyspnea (due to my Chronic Pulmonary condition that I had since a young age). Wearing a mask for that length of time poses serious medical risk to me and hence I am unable to take the exam currently. I can only take the exam without a mask if the testing center allows me to do so and they will only make this

exception and allow me to do so IF and only IF ECFMG now also does its part in granting the accommodation that I need, which is an extension of the seven year policy, hence providing a compelling reason to the testing center to allow me to take the test without a face mask on (eg. ECFMG announces a new extended deadline by which I need to pass the exam in order to be certified, making it a compelling reason for the test center to grant me the ability to take the tests without a mask in order for me to meet this tight deadline). If ECFMG does not provide this extension now, it is reasonable for the testing center to also deny this accommodation of testing without a mask as there is no true compelling reason for it to grant me this accommodation; and freely allowing me to test without a mask (or anyone without a mask) would post health risks to thousands of other test takers. Being unable to take the exam results in my career as a medical doctor to be completely ruined. Without taking and passing the USMLE exams, one can not even apply to residency programs as ALL states in the US require successful passage of the USMLE exams to be licensed as a physician and residency programs all require applicants to have passed the USMLE exams (and certified by the ECFMG) to be eligible to engage in residency training. Furthermore, ECFMG's failure to promise me the extension, prior to completing the USMLE step 2 ck exam, has resulted in the uncertainty of me not knowing whether the ECFMG will or will not grant an extension after I finish the exam. It takes months of dedicated preparation to prepare for this high stakes exam and requires planning and funding to engage in full time preparation of the exam. Not having the certainty that I will be granted the extension, puts my financial situation and career planning at risk because if I am not granted the extension even if I do pass the last exam, I will have lost quite a bit of time and thus also have lost significant funds with nothing to fall back on (something I wouldn't have if I am given a definitive answer as to whether or not I will be granted the extension). This negatively affects my ability to study, prepare, and set a schedule for me to study for and take this high stakes exam. Most other students are able to prepare for the exam knowing that if they pass it, they will be automatically certified (given they pass the series of exams required to be passed). However, I can not study and plan with that same peace, certainty, and pre-planning as ECFMG has clearly stated to me that they will only consider possibly granting me the extension even if I pass. A person named Terrance (a student services representative who works at the ECFMG) also stated to me on the phone that the chance of being granted an extension is extremely low. Therefore ECFMG's failure to definitively grant me an extension has directly and negatively impacted my planning, studying, and funding for the USMLE step 2 ck. Finally, if ECFMG grants me the extension, the test center has stated that they would provide me the ability to test without wearing a mask in a safe place. However, without such an extension by the ECFMG, I will not be granted this opportunity to test as there is not sufficient reason and cause for the test center to provide this opportunity. It is very reasonable of the test center to hold this position given the current situation with the

pandemic and the entire past 1+ year. It is not safe to test at a public testing center without a mask. They can not just easily grant these opportunities without significant compelling reason. Therefore, ECFMG's failure to cooperate and provide this compelling reason (definitively granting me an immediate extension and a reasonable new deadline in terms of when my new extension is up), has resulted in me being unable to even take the exam, as I can not take the exam with a mask (due to a medical condition). If ECFMG grants me an extension now, I will be able to take the exam at the test center without a mask, prior to the new extended deadline. If ECFMG does not grant me this extension now, the test center will not allow me to test without wearing a mask for the time being. It is uncertain if and when they will ever allow me to test without a mask. The test center has stated that it needs a compelling reason and it needs to know that there is going to be a guaranteed benefit by them allowing me to take the exam without wearing a mask, to justify allowing such an accommodation. We must understand that due to the covid-19 pandemic, this type of an accommodation by the testing center puts them at risk and puts the safety and health of thousands of test takers and customers at risk, so they can not freely grant this accommodation. Without having a guarantee of any type and new extended deadline from ECFMG, the test center will not entertain this accommodation, which is reasonable as it puts the test center and people testing at the test center at risk if they easily and freely allow test-takers to test without wearing a mask. Of note, delaying the ECFMG certification process is not to be taken lightly, this delay causes me to have to re-prepare for the first exam that would become invalid, cost significant amount of money to prepare for, register for, AND delay in applying to residency (which otherwise would not be the case as I would have already started residency and start getting paid). Also, it decreases the chances of me being able to get accepted into a residency at all, as any delay is deemed unfavorable by residency programs in general. Residency applications and admissions process is a highly competitive one, and this unreasonable unwillingness to cooperate and accommodate by the ECFMG, makes my slope even steeper. I am not requesting an indefinite extension of my seven years but I am requesting a reasonable extension. Just like this year, ECFMG extended exam scheduling permits (FOR ALL students) from the typical 3 months to 1.5 years and continues to extend permits based on the current situation of the pandemic. Similarly, ECFMG can very well give me such type of an extension on the seven year policy, eg. add 1.5 or 2 years and then reconsider when that time is up, whether or not to extend thereafter, just like ECFMG does with all of its current examinee's scheduling permits. This would be reasonable and fair. But ECFMG chooses not to provide this type of adjustment despite the hardships faced this year and last year due to the pandemic. Under the ADA (Americans with Disabilities Act), Educational Organizations, such as the ECFMG, must provide a reasonable accommodation for individuals with disabilities as long as the accommodation helps mitigate for the restraint caused by the person's disability. In this

case, my disability (having a pulmonary condition) prevents me from taking the exam with a mask on. Up till now, the CDC and general healthcare guidelines prohibited me from taking this exam at public test centers (the only place this exam can be taken) because these test centers require examinees to keep a mask on for the entire 9 hour length of the exam. I have medical documentation from my pulmonologist and team of providers at Johns Hopkins Hospital clearly indicating that I am not safe to wear a mask constantly for eight hours long. It would be unreasonable to ask the test center to change their protocol for me (as an accommodation) because if they were to allow me to test without a mask, it would put others in danger, as well as my-self in danger. This would be highly irresponsible, unethical and potentially even illegal act by the test center. Hence, the only reasonable accommodation that can be sought to mitigate the restraints I face due to my medical condition, is to ask ECFMG to give me a time extension of the seven year rule, eg. for me, change it from seven years to a time frame that would reasonably allow me to take the exam safely without a mask, following CDC guidelines (which is exactly what the test center does follow). A reasonable way to approach this would be to extend the requirement from 7 years to 8.5 years or 9 years, adding 1.5 - 2 years, just like they add to all their scheduling permit extensions (due to the pandemic). If ECFMG can add 1.5 years to scheduling permits without any cost or reapplication required (ECFMG states they added this time of extension due to the pandemic), they should also be able to add this time to my seven year window (again, due to the pandemic and this particular impact I have faced due to the pandemic). At this point, if ECFMG does as such, there is a good chance the test center will allow me to take the test without a mask, which in essence will allow me to test sooner rather than later at a point in time we can not even foresee (this would avoid ECFMG needing to give me a blanket indefinite extension of time). However, ECFMG refuses to even do this. The test center is willing to accommodate and cooperate given ECFMG also cooperates and accommodates by providing a reasonable a compelling reason to grant me the accommodation of taking the exam without a mask, eg. ECFMG providing a reasonable accommodation, a reasonable extension of the 7 year timeframe. If ECFMG does that, the test center will allow me to take the exam without a mask (as an accommodation) before the last day of the new granted extended timeframe by the ECFMG.

I have suffered an injury at the hands of the ECFMG: By ECFMG not extending my 7-year timeline/window of opportunity, I am not unable to take the USMLE step 2 ck exam currently, though I am registered to take the exam. Without being able to take the exam, I will not be able to complete my exams needed to become a fully licensed physician in the United States, something I have worked hard for and devoted many years of full-time education in progress. I have been denied the legal right of a reasonable accommodation under the Americans with Disability Act, whereby an extension to seven year policy be granted to me so that I can complete the USMLE step

2 ck exam. My disability prevents me from taking the exam the way other non-disabled students are able to; eg. with a face-mask covering. ECFMG granting me an extension will provide the test center with ample reason to grant me the permission to take the exam without a face mask. If ECFMG states that it will grant me an extension to the seven year rule now and extend it with a new reasonable deadline, the exam testing facility will be able to acknowledge the time sensitive nature of me needing to take this exam, and they will likely grant me that permission as an accommodation to take the exam without a mask. The test center has already stated that if ECFMG is able to provide documentation that they are granting me an exception to the seven year rule and set a reasonable date in the future in terms of when that extension of the seven years will expire, they will grant me the accommodation of being able to take the exam at the test center without a mask (prior to the new extended deadline). Thus in order for me to successfully take this exam, I need an accommodation from both the testing center AND the ECFMG. The testing center is willing to grant the accommodation as long as ECFMG also grants the accommodation, which for the testing center provides more compelling reason to grant me the accommodation of taking the exam without needing to wear a mask. If ECFMG merely states they will only consider possibly granting me an extension, the test center has no reasonable obligation to accommodate in a timely matter, and as such the testing center maintains the reasonable decision that it will not grant me the accommodation (as it would be unreasonable) and will require me to wait until its institutional policies allow everyone to take the exam without a mask in the same way test takers did pre-covid. This could be a long time from now. Also, ECFMG alludes to giving me the option to retake an exam if need be. Re-taking an exam, as ECFMG is giving me an option of, is not just/fair, as it was not my lack of time management or self-induced reason that prevented me from completing the exams in seven years; rather it was due to the pandemic and the fact that I was required to wear a mask prior to my 7 years being up, in order to complete and sit for the exam, and that prevented me from completing the exam within the seven years. Thus ECFMG's failure to grant me an exception and set a new deadline (extended from the original seven year timeframe), is standing in my way of even completing the exam. ECFMG states my claim is not ripe because it doesn't know if I will or can ever pass the exam. The argument is flawed: the board wise policy ECFMG has with ALL students is that students must complete the USMLE exams within seven years, and that holds true for students that have not yet even started taking any of the exams. So if my argument and request is unreasonable and not ripe for that reason, then how is it that ECFMG has a set seven year policy set for ALL students who have not even taken the exam yet? It is unclear if those students will or can even pass the exams, yet ECFMG still applies the seven year policy upon such students (all students). Hence the argument of my claim/request/grounds not being ripe, does not make sense. Again, ECFMG stating I have two options to reach my goal is not helpful as one of those options involves

retaking my USMLE step 1 exam, which would be extremely costly and time consuming, and moreover, unfair, as I worked hard to pass it the first time and me not being able to pass the subsequent exams within seven years was solely due to issues related to the Pandemic and NOT my own lack of preparation or time management etc. Hence, the claim that I would not suffer any hardship if the court declines to examine this case, is utterly false. It would probably take me 6 months and high cost to re-take an exam, and it would look highly unfavorable to residency programs when I apply, when they see I had to take the exam twice. It is absolutely unjust to require me to retake an exam, when it is not my fault or doing that resulted in me not being able to finish the exams within seven years. I did not choose not to follow instructions. I had no choice because without ECFMG's time extension to the seven years, I am simply UNABLE to take the last exam, and might never be able to take the exam any time soon if the test centers do not let go of the mask wearing policy. It is unreasonable to expect the test center to easily grant people exceptions to "wearing a mask" policy because this affects the safety and health of hundreds and maybe thousands of other people who take the exam at the test center. However the test center has very reasonably state they will grant the accommodation of allowing me to test without a mask as long as I can show that ECFMG has indeed extended my seven year policy to a date that is in the reasonable near future (in which case, the test center will allow me to take the exam without a mask prior to that last date of the extension). Hence I request ECFMG to grant me an extension to the seven years now in writing, pushing back my deadline to pass all exams from 7 years to 6 months after the date ECFMG grants this permission. Eg. if ECFMG grants this permission now, then extend it to December 2021. The earlier ECFMG grants this permission, the less of an overall extension it will need to grant me, and the sooner I will be able to take and pass my exam. If ECFMG does not grant me this extension now, I will not be able to test in the foreseeable future, or ever, if the test center never removes its mask wearing rule/policy.

For the reasons mentioned above, the court should not dismiss this case and should pursue next steps as part of the litigation process.

Dated: June 6, 2021 Respectfully submitted,

/s/ Rajan Patel (Plaintiff pro-se)